Supreme Court, U.S.
FILED
APR 5 1991
OFFICE OF THE CLERK

(3)

NO. 90-1164

In The Supreme Court of the United States

October Term, 1990

WILLIE ALBERT SMITH
PETITIONER

VERSUS

LEE ROY BLACK, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS
RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

BRIEF IN OPPOSITION

MIKE MOORE
ATTORNEY GENERAL
STATE OF MISSISSIPPI

MARVIN L. WHITE, JR.
ASSISTANT ATTORNEY GENERAL
COUNSEL OF RECORD

CHARLENE R. PIERCE
SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MISSISSIPPI 39205
TELEPHONE: (601) 359-3680

COUNSEL FOR RESPONDENT

64

QUESTION PRESENTED

I. Where Petitioner's Due Process Rights Were Not Violated By The Use Of The Testimony of Thomas And Wells Certiorari Should Be Denied.

II. Where The Court Below Correctly Decided That Clemons v. Mississippi Created A New Rule That Will Not Be Applied To Cases On Habeas Review Certiorari Should Be Denied.

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTRODUCTION 1

OPINION BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

A. Procedural History 3

B. Statement of Facts 12

REASONS FOR DENYING THE WRIT 13

ARGUMENT 13

I. Where Petitioner's Due Process Rights Were Not Violated By The Use Of The Testimony of Thomas And Wells Certiorari Should Be Denied. 13

II. Where The Court Below Correctly Decided That Clemons v. Mississippi Created A New Rule That Will Not Be Applied To Cases On Habeas Review Certiorari Should Be Denied. . . 27

CONCLUSION 54

CERTIFICATE OF SERVICE 56

TABLE OF AUTHORITIES

CASES **PAGE**

Brady v. Maryland, , 373 U.S. 667 (1963) 25

Burks v. Egeler, 512 F.2d 221, 229 (6th Cir.), cert. denied, 423 U.S. 937 (1975) 15

Butler v. McKeller, 494 U.S. ___, 110 S.Ct. ___, 108 L.Ed.2d 347 (1990) 14, 36, 44

Clemons v. Mississippi, 494 U.S. ___, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990) 30, 35, 36, 44-50, 54

Clemons v. State, 535 So.2d 1354 (Miss. 1988) 50

Collins v. Youngblood, 497 U.S. ___, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990) . . 32, 33, 35

Gideion v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) 47

Giglio v. United States, 405 U.S. 150 (1972) 25

Hill v. Black, 920 F.2d 249 (5th Cir. 1990) 49

In re Smith, 457 So.2d 911 (Miss. 1984) 9

Johnson v. State, 547 So.2d 59 (Miss. 1989) 50

Marcella v. United States, 344 F.2d 876 (9th Cir. 1965) 16

Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988) 47

Mooney v. Holohan, 294 U.S. 103 (1935) 13, 17, 25

Parker v. Dugger, 498 U.S. ___, 111 S.Ct. ___, 112 L.Ed.2d 812 (1991) 47-49

Penry v. Lynaugh, 492 U.S. ___, 109 S.Ct. 1212, 106 L.Ed.2d 256 (1989) . . . 14

Saffle v. Parks, 494 U.S. ___, 110 S.Ct. ___, 108 L.Ed.2d 415 (1990) . . 14, 36, 44

Sawyer v. Smith, 497 U.S. ___, 110 S.Ct. ___, 111 L.Ed.2d 193 (1990) . . 14, 35, 51

Smith v. Black, 904 F.2d 111 (5th Cir. 1990) . . . 2, 11, 12, 31, 45, 49

Smith v. Black, 904 F.2d 950 (5th Cir. 1990) 2, 31

Smith v. Black, 912 F.2d 1465 (5th Cir. 1990) . . . . . *, *

Smith v. Mississippi, 460 U.S. 1047 (1983) 7

Smith v. State, 419 So.2d 563 (Miss. 1982) 6, 12

Smith v. State, 434 So.2d 212 (Miss. 1983) 8, 29

Smith v. State, 492 So.2d 260 (Miss. 1986) 10

Smith v. State, 500 So.2d 973 (Miss. 1986) 10

Smith v. Thigpen, 689 F.Supp. 644 (S.D.Miss. 1988) 11, 12, 29

Smith v. Thigpen, Civil Action No. J83-0573(B) 11

Smith v. United States, 358 F.2d 683 (3rd Cir. 1966) 16

Smith v. Wainwright, 741 F.2d 1248 (11th Cir. 1984) 15

Stringer v. Black, 909 F.2d 111 (5th Cir. 1990) 49

Sullivan v. Sanders, 863 F.2d 218 (2nd Cir. 1988) 14, 18, 22

Sumner v. Mata, 449 U.S. 539 (1981) 26

Sumner v. Mata, 455 U.S. 591 (1982) 26, 27

Teague v. Lane, 489 U.S. ___, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) 14, 16-18, 31, 32, 35, 44, 47-49, 52, 54

United States ex rel. Burnett v. Illinois, 619 F.2d 668, 674 (7th Cir.), cert. denied, 449 U.S. 880 (1980) 15

United States v. Agurs, 427 U.S. 97 (1976) 25

United States v. Jones, 614 F.2 80 (5th Cir.), cert. denied, 446 U.S. 945 (1980) 15

Wild v. Oklahoma 187 F.2d 409 (10th Cir. 1951) 16

Wiley v. State, 517 So.2d 1373 (Miss. 1987) 53

AMENDMENTS, STATUTES AND RULES **PAGE**

28 U.S.C. §1257(3) 2

Eighth Amendment, United States Constitution 2

Fourteenth Amendment, United States Constitution 2

Miss. Code Ann., § 99-39-23(6), (Supp. 1990) 2

Miss. Code Ann., § 99-39-27(9) (Supp. 1990) 2, 52

U.S.C.A.§ 2254(d) 26

NO. 90-1164

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

WILLIE ALBERT SMITH,
Petitioner

versus

LEE ROY BLACK, Commissioner, Mississippi Department of Corrections, et al.,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

INTRODUCTION

Respondent, Lee Roy Black, respectfully prays that the Petition for Writ of Certiorari to the Supreme Court of the State of Mississippi be denied in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit rendered on June 26, 1990, is reported as

Smith v. Black, 904 F.2d 111 (5th Cir. 1990). A copy of this opinion is before this Court as Appendix A to the petition for certiorari. On August 24, 1990, a petition for rehearing and suggestion for rehearing en banc was denied without opinion. Smith v. Black, 912 F.2d 1465 (5th Cir. 1990). See, Appendix B.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court under the authority of 28 U.S.C. §1254(1), he fails to do so.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner contends that this case involves the application of the Eighth and Fourteenth Amendments of the United States Constitution and Miss. Code Ann., §§ 99-39-27(9) and 99-39-23(6), (Supp. 1990). See, Appendix H.

STATEMENT OF THE CASE

A. Procedural History:

On March 15, 1981, petitioner was arrested for the capital murder of Shirley Roberts. On June 19, 1981, an indictment was returned in the Circuit Court for the First Judicial District of Hinds County, Mississippi, charging petitioner with killing Mrs. Roberts in the course of the commission of a robbery. On July 27, 1981, the matter was called for trial. On July 30, 1981, after returning a verdict of guilty of capital murder, the jury sentenced petitioner to death in the following verdict:

> We, the Jury, find unanimously and beyond a reasonable doubt the following aggravating circumstances:
>
> 1. The capital murder was committed while the defendant was engaged in the commission of robbery;

2. The capital murder was committed for pecuniary gain;

3. The capital murder was especially heinous, atrocious or cruel;

We, the Jury, further find unanimously from the evidence and beyond a reasonable doubt that, after weighing the mitigating circumstances and the aggravating circumstances, one against the other, that the aggravating circumstances do outweigh the mitigating circumstances and that the defendant should suffer the penalty of death.

Tr. at 1615.

Petitioner then took his automatic appeal to the Mississippi Supreme Court, raising the following assignments of error:

1. The trial court committed reversible error by admitting [sic] the prosecution to introduce the criminal record as being that of the defendant's and further by not declaring a mistrial at that point.

2. The Mississippi Code Annotated, §§ 97-3-21 and 99-19-101 (Supp. 1978), are unconstitutional and violative of the Eighth and Fourteenth

Amendments to the United States Constitution.

3. The trial court erred in allowing the prosecution to exhibit gruesome photographs of the victim to the jury for long periods of time during the sentence phase when the same photographs had been previously studied by the jury during the guilt phase of the trial.

4. The verdict of "guilty" in the guilt phase of the trial is contrary to the great weight of evidence.

5. The sentence of "death" in the sentencing phase of the trial is contrary to the great weight of the evidence.

6. The trial court erred in allowing the jury to find during the sentencing phase that the murder was committed for pecuniary gain.

7. The trial court erred in overruling the defendant's Motion to Suppress evidence taken from the defendant's apartment, and further erred by admitting the evidence in the trial over the defendant's objection.

Brief of Appellant on direct appeal.

On August 11, 1982, the conviction and sentence were affirmed by Mississippi Supreme Court. A petition for rehearing was filed and the original opinion was modified without disturbing the affirmance. This September 22, 1982, modified opinion continued to adhere to the previous ruling affirming the conviction and sentence of death. Smith v. State, 419 So.2d 563 (Miss. 1982)(Smith I).

Represented by new counsel petitioner filed a petition for writ of certiorari with this Court. In this first petition Smith raised the following grounds:

> 1. Where defense counsel is competent in some of the cross-examination of prosecution witnesses at a capital trial but is absolutely supine in the face of the prosecution's aggressive thrust at voir dire and in closing argument and fails to protect his client's interests at trial against the argumentative approach of the

prosecution, may counsel be deemed to have rendered ineffective assistance?

2. Should the standard for counsel's ineffective assistance be the farce and mockery test or should that standard be uniformly replaced by the "reasonable competence" standard?

3. Where police enter a dwelling under exigent circumstances without a WARRANT and briefly spot evidence on the premises before leaving to try to find and save a crime victim, may they return after there resolution of the emergency exigent circumstances and, still without a warrant, search for, identify and seize evidence?

Petition for Certiorari from Direct Appeal.

On March 21, 1983, this Court denied certiorari. Smith v. Mississippi, 460 U.S. 1047 (1983).

On April 21, 1983, petitioner commenced his sojourn through the intricate labyrinth of post-conviction collateral relief with the filing of an

Application for Leave to File a Petition for Writ of Error Coram Nobis in the Lower Court with the Mississippi Supreme Court, pursuant to Miss. Code Ann. § 99-35-145 (Repealed April 17, 1984). On June 1, 1983, the state supreme court denied petitioner's request for relief holding virtually all of his claims to be procedurally barred. On July 27, 1983, his petition for rehearing was denied. Smith v. State, 434 So.2d 212 (Miss. 1983)(Smith II).

On August 1, 1983, petitioner filed a petition for writ of habeas corpus with the United States District Court for the Southern District of Mississippi. A stay of execution was entered on August 17, 1983. Further proceedings were stayed in the District Court until such time as petitioner further exhausted his state court remedies. On January 31, 1984,

petitioner filed a second Application for Leave to File a Petition for Writ of Error Coram Nobis with the Lower Court with the Mississippi Supreme Court. Petitioner's allegations involved the claim that two witnesses perjured themselves at trial. This Court granted the application on September 26, 1984, and ordered an evidentiary hearing in the circuit court on the issue. In re Smith, 457 So.2d 911 (Miss. 1984)(Smith III). An evidentiary hearing was held on October 10, 1984, and the trial court issued an unpublished opinion and order on January 16, 1985, denying the requested relief.

Petitioner appealed this ruling to this Court. On March 9, 1986, the denial post-conviction relief was affirmed by the Mississippi Supreme Court. A petition for rehearing was denied on August 13, 1986.

Smith v. State, 492 So.2d 260 (Miss. 1986)(Smith IV).

While this second state post-conviction petition was pending petitioner, in August, 1985, filed yet a third post-conviction motion in state court. This third motion to vacate judgment and set aside sentence was filed under Section 99-39-1, et seq., Miss. Code Ann. (Supp. 1984). This motion was denied by the Mississippi Supreme Court on November 26, 1986. Rehearing was denied on February 11, 1987. Smith v. State, 500 So.2d 973 (Miss. 1986)(Smith V).

On April 7, 1987, petitioner amended his federal petition for writ of habeas corpus and reactivated the proceedings in the Federal District Court.

On June 13, 1988, the District Court issued its memorandum opinion and order denying habeas corpus relief to

petitioner. Smith v. Thigpen, 689 F.Supp. 644 (S.D.Miss. 1988). Petitioner then filed a motion to alter or amend the judgment entered by the District Court. This motion was denied in a two page memorandum opinion and order entered August 26, 1988. Smith v. Thigpen, Civil Action No. J83-0573(B). From this judgment denying habeas relief petitioner took an appeal to the United States Court of Appeals for the Fifth Circuit.

On June 26, 1990, the Fifth Circuit issued an opinion affirming the judgment of the District Court denying habeas corpus relief. The petition for rehearing was denied, without opinion, on August 24, 1990. Smith v. Black, 904 F.2d 950 (5th Cir. 1990). Petitioner then requested the Fifth Circuit to stay the mandate pending his petition for writ of certiorari this motion was denied on September 24, 1990.

Smith's petition for writ of certiorari from the ruling of the Fifth Circuit was originally due on November 23, 1990. Petitioner requested and was granted an extension of sixty (60) days.

B. Statement of Facts:

During the early morning hours of March 15, 1981, petitioner, kidnapped, raped and brutally murdered Shirley Roberts. The facts of this case are graphically and sufficiently set forth in the opinions of the various courts that have considered this case. See, Smith I, 419 So.2d at 564-565; Smith v. Thigpen, 689 F. Supp. at 646-647; Smith v. Black, 904 F.2d at 956-957.

REASONS FOR DENYING THE WRIT

Petitioner has presented no federal question of substance warranting this Court's exercise of its discretionary certiorari jurisdiction.

ARGUMENT

I. Where Petitioner's Due Process Rights Were Not Violated By The Use Of The Testimony of Thomas And Wells Certiorari Should Be Denied.

A QUESTION OF PERJURY?

Petitioner argues that this Court should overturn the precedent of Mooney v. Holohan, 294 U.S. 103 (1935), holding that there be knowing use of perjured testimony before there is a constitutional violation that would cause reversal of a conviction or sentence. Petitioner would have the Court announce a standard that would require reversal of a conviction or

sentence if there was a showing that there has been a "credible recantation of the testimony in question" that "would most likely change the outcome of the trial and a state leaves the conviction in place." The rule petitioner would have this court adopt is found in the case of Sullivan v. Sanders, 863 F.2d 218, 222 (2nd Cir. 1988). It is clear that such a decision would be constitute the announcement of a new rule. This is a course of action which this Court has clearly stated that it will not take in a case on federal collateral review. Teague v. Lane, 489 U.S. ___, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) and Penry v. Lynaugh, 492 U.S. ___, 109 S.Ct. 1212, 106 L.Ed.2d 256 (1989). See, Sawyer v. Smith, 497 U.S. ___, 110 S.Ct. ___, 111 L.Ed.2d 193 (1990), Butler v. McKeller, 494 U.S. ___, 110 S.Ct. ___, 108 L.Ed.2d 347 (1990) and Saffle v.

Parks, 494 U.S. ___, 110 S.Ct. ___, 108 L.Ed.2d 415 (1990). Therefore, even if the Court were of a mind to adopt such a rule we would submit that this is not the proper case in which such a new rule should be announced.

There can be no question that this would be the announcement of a new rule as the other court's that have considered this question have held that there must be knowing use of perjured testimony in order for there to be a due process violation of constitutional dimensions. See, United States ex rel. Burnett v. Illinois, 619 F.2d 668, 674 (7th Cir.), cert. denied, 449 U.S. 880 (1980); Burks v. Egeler, 512 F.2d 221, 229 (6th Cir.), cert. denied, 423 U.S. 937 (1975); Smith v. Wainwright, 741 F.2d 1248, 1257 (11th Cir. 1984); United States v. Jones, 614 F.2 80, 82 (5th Cir.), cert. denied, 446 U.S. 945

(1980); Smith v. United States, 358 F.2d 683 (3rd Cir. 1966); Marcella v. United States, 344 F.2d 876 (9th Cir. 1965); Wild v. Oklahoma 187 F.2d 409, 410 (10th Cir. 1951). Since this Court and the circuit courts that have considered this question have held that there must be a knowing use of perjured testimony in order to make out a due process violation it can hardly be said that such a claim is one of those "bedrock" elements of criminal procedure that represent an exception to Teague.

Likewise, the invitation to the district court and the court below to adopt a negligence standard when considering questions of perjured testimony would require the announcement of a new rule on habeas review. This course of action would also be contrary to the precedent of Teague and its progeny.

The question remains whether the respondent has waived this point at this stage of the proceedings. The brief of respondent was filed less than a month after the decision in Teague. While not citing Teague in its brief to the court below respondent did argue that the district court was correct in rejecting "[p]etitioner's request to . . . engraft upon [the rule of Mooney] some sort of negligence standard." Further, respondent pointed out that petitioner had "cited no authority from [the Fifth Circuit] or nay other adopting such a standard." Finally, respondent argued that the "District Court was correct in eschewing such an invitation [to adopt a negligence rule] by petitioner and holding that the standard set forth in Mooney was the proper test." Brief for Respondent-Appellees at 12. We submit that this argument is sufficient to

preserve the Teague argument at this stage.

While not waiving the bar against announcing a new rule, respondent would point out that even Sullivan requires a credible recantation of the trial testimony. We submit that there has been no such credible recantation in the case at bar.

The history of the so-called perjured testimony is important to the discussion before the case today. The contention is that two of the state's witnesses, Thomas and Wells, perjured themselves at trial when they identified petitioner as the person they saw abducting Shirley Roberts from the Tote-Sum store on Robinson Road in Jackson, Mississippi on March 15, 1981. These witnesses later recanted their identifications in written affidavits obtained through the questionable tactics

of the defendant's family and a private detective agency. Based on these affidavits the Mississippi Supreme Court ordered an evidentiary hearing in the trial court on the matter of whether or not the witnesses perjured themselves at trial and whether or not the state knowingly used perjured testimony. After a hearing on theses claims the state trial court issued a memorandum opinion and order finding that there had been no perjury and that there had been no knowing presentation of false evidence at trial. On appeal from this ruling, the Mississippi Supreme Court disagreed with the trial court and held that the witnesses did perjure themselves.[1] The state supreme court also held, that at

---

[1] The Mississippi Supreme Court based its finding of perjury on the fact that Thomas and Wells had never recanted their recantation.

best there was negligent use of some perjured testimony by the prosecution, but because of the overwhelming nature of the remaining evidence in this case this was not ground for reversal of the conviction or sentence.

On habeas review in the district court the district court held that the standard to be applied to perjured testimony was whether or not the prosecution actually knew that testimony they used was perjured. The negligence standard was forwarded by petitioner was rejected. Additionally, the district court disagreed with the finding of the Mississippi Supreme Court regarding whether or not Thomas and Wells actually perjured themselves. He agreed with the state trial judge that held the evidentiary hearing in this matter that there was no perjury. The district court

properly articulated reasons for finding that the Mississippi Supreme Court's findings were not fairly supported by the record.[2]

On appeal to the Fifth Circuit the court noted the unusual circumstance of a petitioner arguing for federal deference and the state urging agreement with the district court's rejection of the state supreme court's conclusion. However, the court below decided it did not have to address this question because there was no knowing use of perjured testimony by the state. Therefore, there was no ground for habeas relief.

In the state of the record before this Court it can hardly be said that

---

[2] The district court recognized that it had to make detailed findings as to why the finding of the Mississippi Supreme Court was not fairly supported by the record. He did so. 689 F. Supp. 652-657.

there has been a credible recantation of the trial testimony. The state trial court and the federal district court have found that there was no perjury. The Mississippi Supreme Court has held that because the recantations go unrecanted there must be perjury. Where there is such a disagreement over the question of whether or not there has even been perjured testimony introduced at trial it can hardly be said that there is a credible recantation of the trial testimony. Therefore, petitioner's argument under Sullivan, is unpersuasive.

Likewise, petitioner's urging of a negligence standard is with out persuasive force. As the court below held:

> Smith's argument for an extension of the negligence standard of **United States v. Agurs**, 427 U.S. 97, 96 S.C.t 2392, 49 L.Ed.2d 342 (1976), is not sufficiently convincing to override this practice. As the

district court explained, Smith's use of **Giglio v. United States**, 405 U.S. 150, 152-54, 92 S.Ct. 763, 765-66, 31 L.Ed.2d 104 (1972), to support the negligence standard is inapposite; **Giglio** concerned the particular circumstances of the nondisclosure of a promise of nonprosecution made in exchange for witness testimony. **Agurs** afterward reported that the rule of **Brady** may "arguably" apply in the situation in which "undisclosed evidence demonstrates that the prosecution's case includes perjured testimony and that the prosecution knew, or should have known, of the perjury,' but was clear in reporting the subsequently settled rule that knowing use of perjured testimony was fundamentally unfair. 427 U.S. at 103-04, 96 S.Ct. at 2397-98. The discussion in **Agurs** relied on by Smith more precisely referred to the materiality of nondisclosed evidence, a subject considered below in connection with his **Brady** claim.

Reviewed under the **Mooney** standard, and assuming without deciding that the in-court identification constituted perjury, Smith does not establish that the prosecution knew. Cf. **Braxton**, 641 F.2d at 395. For the very reasons

detailed by the district court toward the contention the testimony was not perjury, 689 F.Supp. at 652-657, the prosecutors could reasonably have concluded that the inconsistency of Wells and Thomas related to a reluctance to testify. Both evidenced a detailed observation of the abduction in their initial contact with he police, although they indicated on that occasion and others preceding trial that they could not identify the culprit. Thomas, however, contended at trial that he had in fact recognized Smith at the police lineup, and had so informed the prosecution on the first day of the trial. Thomas coherently explained his vacillations: he had refrained from identifying Smith to the prosecution because of pressure he felt from relatives, and likewise had told Smith's sisters and defense counsel's son that he could not identify the perpetrator, but had to tell the truth when eh was forced to testify under subpoena. Wells, the eyewitness whose testimony proved less damaging to Smith, simply testified that he had identified Smith at his first opportunity to do so, in the photographic lineup. The credibility of these explanations is cast into severest doubt by their after-

> trial recantations, but the prosecution cannot be charged with knowledge of their latent positions. We cannot conclude that what appears to have been the Mississippi Supreme Court's conclusion that the prosecution did not knowingly use perjured testimony, **Smith v. State**, 492 So.2d at 267, was not fairly supported by the record. **Sumner v. Mata**, 449 U.S. at 551-52, 101 S.Ct. at 771.

904 F.2d at 961-962.

The court below correctly concluded that the prosecution did not knowingly use perjured testimony. Petitioner's reading of United States v. Agurs, 427 U.S. 97 (1976), Giglio v. United States, 405 U.S. 150 (1972), and Brady v. Maryland, , 373 U.S. 667 (1963), as overruling Mooney is incorrect. Consequently, we submit that the Fifth Circuit, the district court and the Mississippi Supreme Court were all correct in holding that there was no knowing use of perjured testimony.

Therefor there is no relief available to petition.

Further, respondent would reurge its argument that the state trial court and the federal district court were correct in their findings that there was no perjury. Respondent agrees with the teachings of Sumner v. Mata, 449 U.S. 539 (1981) (Sumner I), holding that, generally a finding of fact by a state court, even an appellate court, is to be afforded a presumption of correctness by a federal court in a habeas proceeding. U.S.C.A.§ 2254(d). However, this is not an inviolate wall. In Sumner v. Mata, 455 U.S. 591 (1982) (Sumner II), this Court held:

> [I]f a federal court concluded that the presumption of correctness does not control, it must provide a written explanation of the reasoning that led it conclude that one or more of the first seven factors

> listed in §2254 were present, or the "reasoning which led it to conclude that the state finding was "not fairly supported by the record." 449 U.S., 551, 66 L.Ed.2d, 101 S.Ct. 764.
>
> 71 L.Ed.2d at 484.

The district court fully complied with the dictates of Sumner II making his detailed findings as to why the Mississippi Supreme Court's conclusion was not fairly supported by the state court record. We submit that the district court, like the state trial court, was correct in his conclusion that there was not perjured testimony.

We would submit that the issue was correctly decided by the court below and certiorari should be denied.

II. Where The Court Below Correctly Decided That Clemons v. Mississippi Created A New Rule That Will Not Be Applied To Cases On Habeas Review Certiorari Should Be Denied.

The court below was presented with a question involving the application of the "especially heinous" aggravating factor. The states initial response to the question was that the claim was procedurally barred from consideration for the failure to timely object at trial. The Mississippi Supreme Court found the claim to be procedurally barred from consideration on state post-conviction review stating:

> At trial there was no objection to the instruction on the aggravating circumstance set forth in Mississippi Code Annotated § 99-19-101(5)(h) as to the heinous, atrocious, or cruel nature of the murder. Likewise, the giving of this instruction was not raised on direct appeal, barring petitioner from raising it in post-conviction proceedings. See Mississippi Supreme Court Rule 42.

Smith II, 434 So.2d at 218.[3]

On habeas review the district court held both in its original opinion and in the opinion on the motion to alter or amend that this claim was barred from consideration because it was not raised at trial or on direct appeal. Petitioner's claim was that "Mississippi's use of heinousness as an aggravating factor is not sufficiently limited." The district court in answer held: "None of these issues was raised at trial or on direct appeal, and they are procedurally barred." Smith v. Thigpen, 689 F.2d 644, 662-663 (N.D. Miss. 1988). The procedural bar was the basis of our response in the original briefs filed in the court of appeals.

---

[3] There is nothing ambiguous about the application of the state procedural bar to this question. Therefore, there is no Harris v. Reed, 489 U.S. 255 (1989), problem.

In the meantime this Court decided the case of Clemons v. Mississippi, 494 U.S. ___, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990). Petitioner requested and was granted leave to file a supplemental brief based on this Court's decision in Clemons. The basis of the response of the state was that the claim continued to be procedurally barred from consideration for the failure to present the claim at the proper time and the proper manner. This response was filed on April 18, 1990.

On May 15, 1990, the court of appeals requested that both parties file a reply to the following question.

> Does the claim of petitioner that his sentence was unconstitutionally imposed in light of **Maynard vs. Cartridge**, [sic] 486 U.S. 356 (1988), and **Clemons vs. Mississippi**, 110 S.Ct. 1441 (1990), rely on constitutional rules which are "new" relative to the date on which his conviction became final, and which are the subject

of the non-retroactivity rule originating in **Teague vs. Lane**, 109 S.Ct. 1060 (1989)?

The respondent argued that the claim was barred by Teague. Respondent also reiterated that the claim was procedurally barred in any event for the failure to raise the claim in state court at the proper time and the proper manner.[4]

On June 26, 1990, the court below issued its opinion holding that consideration of the "especially heinous" claim was barred by Teague. Smith, 904 F.2d 950 (5th Cir. 1990).[5]

---

[4] We continue to assert that this is a adequate and independent state law ground that bars consideration of this issue.

[5] The court below decided that the Teague inquiry should be made before an inquiry in to whether or not the claim was procedurally barred from review on state law grounds. Finding that Teague, the court concluded that it did not have to reach the procedural bar question or the merits of the claim.

The first question that we must consider is whether it was proper for the district court to raise the issue of non-retroactivity on its own motion. The basis of petitioner's argument is that Collins v. Youngblood, 497 U.S. ___, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990), prohibits such action. While this court made clear that a court "need not" raise the Teague bar on its own motion, there is no prohibition to one doing so. The Court stated:

> Generally speaking, "[r]etroactivity is properly treated as a threshold question, for, once a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated." **Teague**, supra, at 300, 103 L.Ed.2d 334, 109 S.Ct. 1060. The State of Texas, however, did not address retroactivity in its petition for certiorari or its briefs on the merits, and when asked about the issue at oral argument, counsel answered that

> the State had chosen not to rely on **Teague**. Tr. of Oral arg. 4-5. Although the **Teague** rule is grounded in important considerations of federal-state relations, we think it is not "jurisdictional" in the sense that this Court, despite a limited grant of certiorari, must raise and decide the issue sua sponte. Cf. **Patsy v. Board of Regents of Fla.**, 457 U.S. 496, 515, n. 19, 73 L.Ed.2d 172, 102 S.C.t 2557 (1982) (Eleventh Amendment defense need not be raised and decided by the Court on its own motion.). We granted certiorari to consider the merits of respondent's ex post facto claim, and we proceed to do so.
>
> 111 L.Ed.2d at 38.

The clear implication from the Court's opinion in Collins, is if the retroactivity defense had been raised in the briefs or even at oral argument that the Court would have had to address the question of retroactivity. The court below considered the effect of Collins before it proceeded to address the question. The court held in footnote 12:

After **Teague**, which sua sponte considered the nonretroactivity issue based on the suggestion on an amicus brief, 109 S.Ct. at 1069, circuit courts have split as to the appropriateness of considering **Teague** limitations without the issue having been raised by the parties. Compare, e.g. **Hill v. McMackin**, 893 F.2d 810, 813 (6th Cir 1989) (deciding application of **Teague**) with **Hanrahan v. Greer**, 896 F.2d 241, 245 (7th Cir. 1990). The Fifth Circuit has not explicitly confronted the issue. Given **Teague** itself and the subsequent sua sponte resolution of **Saffle v. Parks**, ___ U.S. ___, 110 S.Ct. 1257, 1264 n. 1, 108 L.Ed.2d 415 (1990) (Brennan, J., dissenting), we believe the better choice is to reach the **Teague** issue now pressed by the State. Compare **Collins v. Youngblood**, ___ U.S. ___, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990) (declining to reach **Teague** question abjured by counsel for state); **Patsy v. Board of Regents of Fla.**, 457 U.S. 496, 515 n. 19, 102 S.Ct. 2557, 2567 n.19, 13 L.Ed.2d 172 (1982) (complying with request of state to pass on potential Eleventh Amendment issue).

904 F.2d at 981.

We submit that Collins simply states that Teague is not a jurisdictional rule that must be raised in every case. This does not prevent a court from raising the question sua sponte. The court below committed no error in raising the question of retroactivity.

Looking to what the court below held we find that it concluded that this Court "limited for the first time Mississippi's practice of supporting a death sentence on the basis of a remaining, valid aggravating factor." 904 F.2d at 983. Judge King's analysis is clear and correct in holding that Clemons represents new law that is not available to petitioner in a federal post-conviction setting. The opinion of the court below correctly applies the constitutional standard to the question at hand. Sawyer v. Smith, 497 U.S. ___, 110 S.Ct. 2822, 109 L.Ed.2d 193

(1990); Saffle v. Parks, 494 U.S. ___, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990); Butler v. McKeller, 494 U.S. ___, 101 S.Ct. 1212, 108 L.Ed.2d 347 (1990). A look at the opinion of the Fifth Circuit will be helpful as it would be hard to embellish on the excellent analysis found there. After looking at the opinion in Clemons, the court below held:

> **Saffle's** reading of **Lockett** and **Eddings** stressed that "[t]here is a simple and logical difference between rules that govern what factors the jury must be permitted to consider in making its sentencing decision, and rules that govern how the State may guide the jury in considering ans weighing those factors in reaching a decision," and noted that rules regarding "how [the jury] must consider the mitigating evidence" were not within the ambit of those cases. ___ U.S. at ___, 110 S.Ct. at 1261; see also **Sawyer v. Smith**, ___ U.S. ___, ___, 110 S.Ct. 2822, 2828, 111 L.Ed.2d 193 (1990) ("general proposition[s]" divined from **Lockett** and **Eddings** insufficiently determinative for

Teague test, aff'g **Sawyer v. Butler**, 881 F.2d 1273 (5th Cir. 1989) (en banc). Mississippi's practice neither addresses what factors the jury may consider, nor, in fact, any consideration by the jury at all; the jury in Smith's case. per instance, was free to consider any statutory or non statutory mitigating evidence it chose. Mississippi has simply developed a practice as one component of its review process that ignores invalid aggravating circumstances for the sake of valid ones.

Not until **Clemons v. Mississippi** did the United States Supreme Court specifically apply **Godfrey** and **Maynard** to the Mississippi aggravating circumstance, and before that application it could at least be said that the constitutional practice of Mississippi's redemptive status was ambiguous, making reasonable for **Teague** purposes the rule preceding **Clemons**. See **Butler**, ___ U.S. at ___, 110 S.Ct. at 1217; **Saffle**, ___ U.S. at, 110 S.C.t at 1260-61. In **Evans v. Thigpen**, 809 F.2d 239, 241 (5th Cir.)(dicta), cert. denied, 483 U.S. 1033, 107 S.Ct. 3278, 97 L.Ed.2d 782 (1987), **Edwards v. Scroggy**, 849 F.2d 204, 211 n.7 (5th Cir. 1988), cert. denied, ___ U.S. ___, 109 S.Ct. 1328, 103 L.Ed.2d 597 (9189), and most

recently in **Stringer v. Jackson**, 862 F.2d 1108, 1113-15 (5th Cir. 1990), which the Supreme Court has vacated and remanded for consideration in light of **Clemons v. Mississippi**, see ___ U.S. ___, 110 S.Ct. 1800, 108 L.Ed.2d 931 (1990), various panels of this court have sustained death sentences premised in part on an invalid aggravating circumstance by recognizing the Mississippi practice of sustaining verdicts when supported by at least one valid aggravating circumstance. Under this practice, perhaps first represented in **Evans v. State**, 422 So.2d 737, 743 (Miss. 1982), cert. denied, 461 U.S. 939, 103 S.Ct. 2111, 77 L.Ed.2d 314 (1983), the Mississippi Supreme Court typically would recognize the problematic constitutionality of the "especially heinous, atrocious, or cruel" aggravating circumstance, possibly review the sentence for proportionality and under the **Coleman** limiting construction of the circumstance, and uphold the sentence if in any event the jury had found at least one other valid aggravating circumstance. See, e.g., **Pinkney v. State**, 538 So.2d 329, 355-58 (Miss.1988), vacated and remanded for further consideration in light of Clemons v. Mississippi, ___ U.S.

___, 110 S.Ct. 1800, 108 L.Ed. 931 (1990); **Lanier v. State**, 533 So.2d 473, 491 (Miss. 1988) (alternative holding; sentence vacated on other grounds); **Lockett v. State**, 517 So.2d 1317, 1336 (Miss.1987) (alternative holding), cert. denied, 487 U.s. 1210, 108 S.C.t 2858, 101 L.Ed.2d 895 (1988); **Johnson v. State**, 511 So.2d 1333, 1336-39 (Miss. 1987) (alternative) rev'd sub nom. **Johnson v. Mississippi**, 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988); **Stringer v. State**, 500 So.2d 928, 944-45 (Miss.1986); **Irving v. State**, 498 So.2d 305, 314 (Miss. 1986) (alternative holding), 481 U.S. 1042, 107 S.C.t 1986, 95 L.Ed.2d 826 (1987); **Edwards v. State**, 441 So.2d 84, 92 (Miss. 1983) (alternative holding; sentence vacated on divided opinion; **Tokman v. State**, 435 So.2d 664, 670 (Miss. 1984) (alternative holding), cert. denied, 467 U.S. 1256, 104 S.Ct. 3527, 82 L.Ed.(1984).

This practice relied in part on decisions of the Supreme Court subsequent to **Lockett** and **Eddings** (and subsequent by a matter of months to the point at which Smith's conviction became final) that might with hindsight be read as anticipating **Clemons**, but at the time might have appeared to confirm the

constitutionality of the Mississippi practice. **Zant v. Stephens**, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983), upheld a death sentence administered under the Georgia sentencing scheme when one of the three aggravating circumstances found by the jury was subsequently held invalid by the Georgia Supreme Court while the other two aggravating circumstances were specifically upheld. Although the opinion recognized the potential difference attending a "weighing" state, id. at 873 n.12, 890-91, 103 S.Ct. at 2741 n. 12, 2750, the chief import of the decision was often viewed as confirming the constitutional latitude afforded the common state practice of redeeming death sentences when more than one aggravating circumstance was present, and **Zant** was relied upon by this court and the Mississippi Supreme Court in warranting the Mississippi practice. See, e.g., **Stringer v. Jackson**, 862 F.2d at 113-14; **Lanier v. State**, 533 So.2d at 491; **Lockett v. State**, 517 So.2d at 1336; **Johnson v. State**, 511 So.2d at 1336-39; **Stringer v. State**, 500 So.2d at 944-45; **Irving v. State**, 498 So.2d at 314.[16] Similarly, while the plurality opinion in **Barclay v. Florida**, 463 U.S. 939, 103 S.C.t 3418, 77 L.Ed.2d 1134 (1983),

might have suggested a reservation regarding certain circumstances in "weighing" states, see id. at 954 n. 12, the opinion also noted that Florida, like Georgia, "requires the sentencer to find at least one valid aggravating circumstance before the death penalty may even be considered," id. at 954, 103 S.Ct. at 3427, and ultimately upheld the Florida scheme. Finally, **Maynard v. Cartwright** left to Oklahoma the redetermination of sentence and recognized the possibility that the court"would not necessarily set aside a death penalty where on appeal one of several aggravating circumstances has been found invalid or unsupported by the evidence." 486 U.S. at 365, 108 S.Ct. at 1860.

To the extent that these cases contain reservations distinguishing schemes like that administered by Mississippi, it cannot be said that such distinctions represented legal determinations that control the outcome of Smith's case, and certainly not so for the law applicable at the time his conviction became final. The Supreme Court explicitly acknowledged at a time prior to that date that it would not distinguish between functionally similar sentencing schemes, even

if the differences would obviate the potential distinctions marking a "weighing" state. See **Franklin v. Lynaugh**, 487 U.s. 164, 108 S.Ct. 2320, 2331 n. 12, 101 L.Ed.2d 155 (1988) (citing **Adams v. Texas**, 448 U.S. 38, 46, 100 S.Ct. 2521, 2526, 65 L.Ed.2d 581 (1980)); see also **Stringer v. Jackson**, 862 F.2d at 1115 (opining that there is "no difference, other than on in semantics, between instructing a jury to weigh aggravating against mitigating circumstances in determining the sentence in instructing a jury to consider all aggravating and mitigating circumstances in deciding on the sentence"). Of the large number of cases which have enforced a practice such as that of Mississippi, the majority have ignored fine distinctions among the various states's capital schemes. [Citations omitted.]

Rather than allowing the federal judiciary a means of reneging on its commitment to the proposition that there is no "one right way for a State to set up its capital sentencing scheme," **Spaziano v. Florida**, 468 U.S. 447, 464, 104 S.Ct. 3154, 3164, 82 L.Ed.2d 340 (1984), the **Teague** doctrine in part tolerates the diversity of state schemes by accepting the fact that various jurisdictions will not always correctly

anticipate the ultimate constitutional significance of every detail. Instead, "reasonable, good-faith interpretations of existing precedents" are sufficient to prevent application of new law. **Butler** 110 S.Ct. at 1217; see also **Sawyer v. Smith**, ___ U.S. at ___, 110 S.Ct. at 2828-29 (incorrect characterization of Supreme Court precedent by Mississippi Supreme Court further indicates extent to which subsequent constitutional ruling was not dictated.) We hold, consequently, that the application of **Clemons** to Smith would involve the application of a "new rule" on collateral review, a practice normally barred by **Teague**.

---

[16] **Butler's** observation regarding the retroactivity of judicial rhetoric is surely appropriate to any effort to locate the distinctions of **Clemons** in **Zant**. In **Johnson v. Mississippi**, for example, the Court stressed its "specific[] reli[ance]" in that case on the admissibility of evidence at the sentencing hearing, 486 U.s. 578, 590, n.9, 10 S.Ct. 1981 n. 9, 100 L.Ed.2d 575 (1988), a characterization of **Zant** that by itself might well warrant affirming Smith's sentence.

904 F.2d at 984-986.

Clearly, the Fifth Circuit applied the proper constitutional standard when analyzing whether or not Clemons represents new law. There was close adherence to the teachings of Butler and Saffle. The decision in Clemons, setting forth limitations on Mississippi's practice of supporting a death sentence on the basis of the remaining, valid aggravating factors was not dictated by prior precedent of this Court.

Even though the question of whether or not Clemons, is new was answered in a manner against petitioner's position, that did not end the inquiry. As it was required to do, the Fifth Circuit continued its analysis to determine whether or not Clemons represented a decision that fell into one of the two exceptions to the application of Teague.

Since, the decision in Clemons would not decriminalize a class of conduct nor would it prohibit the imposition of capital punishment on a particular class of individuals the first exception would not have any application to Stringer's case. Smith, 904 F.2d at 986.

Looking to the second exception the Fifth Circuit held:

> The second exception is for those rare "watershed rules of criminal procedure" which implicate the fundamental fairness and accuracy of the criminal proceeding. See **Saffle,** ___ **U.S.** at ___, 110 S.Ct. at 1263; **Butler,** 110 S.Ct. at 1218. As the en banc court noted in **Sawyer v. Butler,** 881 F.2d 1273, 1294 (5th Cir. 1989) (en banc), aff'd, sub nom. **Sawyer v. Smith,** ___ U.S. ___, 110 S.Ct. 2822, 111 L.Ed.2d 193 (1990), this exception is tailored to those rules designed to redress constitutional violations which "so distort the judicial process as to leave one with the impression that there has been no judicial determination at all, or else skew the actual evidence crucial

> to the trier of fact;s disposition of the case," and does not include procedurally flawed contemplation or review of relevant evidence. As the Supreme Court recently observed in **Sawyer v. Smith**, "[a]ll of our Eighth Amendment jurisprudence concerning capital sentencing is directed toward the enhancement of reliability and accuracy in some sense," but **Teague's** second exception is limited to "watershed" rules affecting "bedrock procedural elements." ___ U.S. at ___, 110 S.Ct. at 2931. The rule on which Smith would rely is not such exalted stature.
>
> Because we conclude that a necessary component of Smith's claim that the use of the "especially heinous" aggravating circumstance in his sentencing phase was barred by **Teague**, we do not consider whether that claim has been procedurally barred or has merit.
>
> 904 F.2d at 986-987.42

This analysis is correct. In Clemons, the Court stated that on remand the Mississippi Supreme Court could preform a reweighing of the aggravating and mitigating circumstances or it could

perform a "harmless error analysis" and affirm a death sentence in the face of an invalid aggravating circumstance. The fact that the appellate court is allowed to perform a harmless error analysis to a Clemons error demonstrates that it is not the "watershed" or "bedrock procedural elements" spoken of in Teague. The Court has usually cited Gideion v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) as an example of the type rule that comes within this exception. It cannot be said that Clemons or Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), either one come within this exception.

Petitioner, further contends that Parker v. Dugger, 498 U.S. ___, 111 S.Ct. ___, 112 L.Ed.2d 812 (1991), represents the retroactive application of Clemons, to a case on federal post-conviction review

thereby voiding the reasoning of the Fifth Circuit. At first reading this misconception might be entertained. However, upon inquiry beyond the surface we find this is not the case. Upon inspection, the answer becomes clear. The decision in Parker is, at best, inconclusive as to whether Clemons should be applied retroactively. The simple reason for this position is that the bar found in Teague, was never interposed as a defense to the claim presented to the United States Supreme Court. Teague is not mentioned in the briefs filed by Florida, nor was it mentioned at oral argument of the case.[6] Therefore, Parker does not represent precedent that causes a

---

[6] As is noted in Florida's petition for rehearing the issue upon which Parker was reversed was not one of the questions presented to the Court for resolution.

conflict with the ruling of the court below in Hill v. Black, 920 F.2d 249 (5th Cir. 1990); Stringer v. Black, 909 F.2d 111 (5th Cir. 1990) and Smith.

In Parker, as we stated above, the issue of retroactivity was not raised in the briefs or at oral argument. This Court was under no duty to raise the claim on its own motion, a course that was specifically declined by the State of Texas. In the posture of the case, the issue of the retroactivity of Clemons never come up in Parker and the Court chose not to address the issue on its own motion. The decision offers no guidance on the issue of whether or not Clemons is to be applied retroactively.

Petitioner contends that respondent has waived the point when it did not raise Teague in the response to the supplemental brief filed in the court below. However,

since the Fifth Circuit was free to raise the retroactivity issue sua sponte it cannot be said that the respondent has waived the defense.

Petitioner's argument that under state law Clemons is not new law because the Mississippi Supreme Court, in Johnson v. State, 547 So.2d 59 (Miss. 1989), changed Mississippi law is not availing. First, the Mississippi Supreme Court, in Johnson, did not change Mississippi law. It simply stated that it had two courses of action open to it, remand the case to the trial court for a new sentencing hearing or reimpose the sentence of death itself. There was no change in the law as to the process the court would employ if it chose to make the decision to reimpose the sentence of death. This is clear as the court cited its decision in Clemons v.

State, 535 So.2d 1354 (Miss. 1988), as the basis for the decision.

In any event, this Court made plain that "'the availability of a claim under state law does not of itself establish that a claim was available under the United States Constitution.'" Sawyer, 111 L.Ed.2d at 209. In Sawyer, when discussing reliance on state law to claim that a rule is not new law, the Court stated:

> Reliance od State law cases for the proposition that the rule adopted in **Caldwell** was an old one misapprehends the function of federal habeas corpus. As we have said, the "'relevant frame of reference'" for the new rule inquiry "'is not the purpose of the new rule whose benefit the [defendant] seeks, but instead the purposes for which the writ of habeas corpus is made available.'" **Teague**, 489 U.S., at 306, 103 L.Ed.2d 334, 109 S.Ct. 1060 (quoting **Mackey v. United States**, 401 U.S. 667, 682, 28 L.Ed.2d 404, 91 S.Ct. 1160 (1971)). Federal habeas corpus serves to ensure that

> state convictions comport with the federal law that was established at the time the petitioner's conviction became final.
>
> 111 L.Ed.2d at 209-210.

Therefore, the state of the law in Mississippi at present is not a factor that is considered when making the analysis as to whether a rule is new under Teague.

Finally, petitioner argues that the Mississippi Post-Conviction Collateral Relief Act, allows for consideration of "new law" in successive petitions. Petitioner bases that assertion on Miss. Code Ann., § 99-39-27(9) (Supp. 1990), which states in part that "excepted form [the prohibition to the filing of second or successive petitions] are those cases in which the prisoner can demonstrate either that there has been an intervening decision of the supreme court of either

the state of Mississippi or the United States which would have actually adversely affected the outcome of his conviction or sentence . . ." This might be persuasive without reading the case law that has construed this provision. In Wiley v. State, 517 So.2d 1373 (Miss. 1987), the Mississippi Supreme Court held:

> Wiley refers to the "intervening decision" of the U.S. Supreme Court in **Booth v. Maryland**, ___ U.S. ___, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987). However, an intervening decision alone does not preclude a waiver under Miss. Code Ann. § 99-39-21, but can only except the case from the effect of the three-year statute of limitations in §99-39-5(2) and the prohibition of second petitions in § 99-39-27(9). [Emphasis added.]
>
> 571 So.2d at 1377.

Wiley was pursuing his first post-conviction petition when this decision was rendered, Smith's presently has his fourth petition pending before the state court.

As was pointed out above this claim was held to be procedurally barred by the Mississippi Supreme Court in the first post-conviction petition. Therefore, the exception could not grant petitioner relief.

The Fifth Circuit correctly and properly found that "the application of Clemons to Smith's case would involve the application of a 'new rule' on collateral review, a practice normally barred by Teague." 904 F.2d 986. Since the decision of the court below is correct certiorari should be denied.

CONCLUSION

For the above and foregoing reasons the petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit in this case should be denied.

Respectfully submitted,
MIKE MOORE
ATTORNEY GENERAL
STATE OF MISSISSIPPI

MARVIN L. WHITE, JR.
ASSISTANT ATTORNEY GENERAL
(Counsel of Record)

CHARLENE R. PIERCE
SPECIAL ASSISTANT
ATTORNEY GENERAL

COUNSEL FOR RESPONDENT

Office of the Attoreny General
Post Office Box 220
Jackson, Mississippi 39025
Telephone: (601) 359-3680

CERTIFICATE OF SERVICE

I, Marvin L. White, Jr., Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be mailed, via United States Postal Service, first-class postage prepaid, three (3) true and correct copies of the foregoing **Brief in Opposition** to the following:

Bruce D. Angiolillo, Esquire
Simpson Thacher & Bartlett
425 Lexington Avenue
New York, New York 10017-3909

This the 5th day of April, 1991.

MARVIN L. WHITE, JR.